



Model Hearing Program Substantive Law Lecture:

**Asylum, Withholding of Removal,
and Protection Under the
U.N. Convention Against Torture**

October 2021



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Purpose

- Provide a **basic overview** of the legal framework underlying **Asylum, Withholding of Removal** under the Immigration and Nationality Act, and Protection under the United Nations **Convention Against Torture**.
- The information in this lecture is **not a comprehensive review** of the topics that will be covered in the model hearings. Rather, this lecture provides targeted information to give context to the issues raised in the model hearings.
- For more information, please consult the relevant legal authorities, including statutes, regulations, and case law.



Overview

In this session, we will review:

- Asylum;
- Withholding of Removal under the Immigration and Nationality Act (INA); and
- Protection under the United Nations Convention Against Torture (CAT).

Note that this overview is accurate based on the law as of October 28, 2021, but the law may have since changed.



Legal Authorities

- Statutes
 - Immigration and Nationality Act (INA), Title 8 of the U.S. Code
- Regulations
 - Title 8 of the Code of Federal Regulations (8 C.F.R.)
- Board of Immigration Appeals (BIA or the Board) precedent decisions
- Attorney General (AG) precedent decisions
- Federal court decisions
- Supreme Court decisions



What is Asylum?

- A form of relief available to noncitizens who fear persecution based on a protected ground in their country of nationality or last habitual residence.
- If an Immigration Judge grants Asylum, the Government cannot remove the applicant from the United States.



How do you qualify for Asylum?

An Asylum applicant bears the burden to show that they meet the statutory definition of a “refugee”:

- a person who is outside of their home country or where they last habitually resided
- and who is **unable or unwilling** to return to, and is unable or unwilling to avail themselves of the protection of, that country
- because of **persecution** or a **well-founded fear of future persecution**
- on account of a **protected ground**—race, religion, nationality, membership in a particular social group, or political opinion.

References:

- INA §§ 101(a)(42)(A), 208(b)(1)
- 8 C.F.R. § 1208.13



How do you qualify for Asylum? (Cont.)

- Asylum applicants may claim:
 - **Past Persecution (PP),**
 - **a Well-Founded Fear of Future Persecution (WFF), or**
 - **Both.**
- Both PP and WFF require the applicant to prove ***four elements***:
(1) **harm constituting persecution**, (2) **a protected ground**,
(3) **nexus**, and (4) **state action** (+ (5) **discretion**).

References:

- INA § 101(a)(42)(A)
- 8 C.F.R. § 1208.13(b)



Bars to Asylum

Several “bars” render a noncitizen ineligible for Asylum:

- One-year bar – INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)
- Firm resettlement bar – INA § 208(b)(2)(A)(vi); 8 C.F.R. § 1208.15
- Aggravated felony bar – INA § 208(b)(2)(B)(i)
- Frivolous Asylum claim – INA § 208(d)(6)
- Previously filed Asylum application – INA § 208(a)(2)(C)
- Reinstated removal order – INA § 241(a)(5)

However, the noncitizen may still be eligible for Withholding of Removal under the INA or protection under the CAT.



Bars to Asylum and Withholding of Removal

These bars render a noncitizen ineligible for Asylum and Withholding of Removal under the INA:

- Persecutor bar – INA §§ 208(b)(2)(A)(i), 241(b)(3)(B)(i)
- Particularly serious crime bar – INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii)
- Serious nonpolitical crime bar – INA §§ 208(b)(2)(A)(iii), 241(b)(3)(B)(iii)
- Security threat bar – INA §§ 208(b)(2)(A)(iv), 241(b)(3)(B)(iv)
- Terrorist bar – INA §§ 208(b)(2)(A)(v), 241(b)(3)(B)(iv)

However, the noncitizen may still be eligible for protection under the CAT.



Credibility and Corroboration

- Credibility is a threshold issue.
- The applicable credibility standard depends on whether the application for relief was filed before or after enactment of the REAL ID Act (May 11, 2005).
- Under the REAL ID Act, an applicant may sustain their burden of proof through testimony alone, but only if they satisfy the trier of fact that their testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that they are a refugee. **However**, an IJ may require corroboration ***even if*** the applicant testifies credibly.

References: INA §§ 208(b)(1)(B)(i)-(ii), 240(c)(4)(B), 241(b)(3)(C)



Past Persecution

Asylum Element #1: Harm Constituting Persecution (1 of 3)

What is persecution?

- **Severe** harm or suffering
 - May involve physical violence
 - Non-physical violence may also constitute persecution
 - Example: deliberate imposition of **severe** economic disadvantage or deprivation of liberty, food, housing, employment, or education
- Inflicted to punish a person for possessing a belief or characteristic that the persecutor seeks to overcome

References:

- *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)
- *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)



Past Persecution

Asylum Element #1: Harm Constituting Persecution (2 of 3)

How is alleged harm assessed?

- When considering whether alleged harm constitutes persecution, the Immigration Judge considers the harm in the **aggregate**.
- Threats of harm alone usually are not enough to constitute persecution. **Actual harm** is generally required.
- **Multiple incidents, considered together, may constitute persecution**, especially if escalating in nature.

References:

- *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998)
- *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)



Past Persecution

Asylum Element #1: Harm Constituting Persecution (3 of 3)

The following, without more, generally do NOT constitute persecution:

- Discrimination
- Generalized conditions of violence
- Generalized poverty or an unfavorable economic situation
- Damage to personal property
- Attempts by law enforcement to detain a person for legal reasons
- Military recruitment
- Anonymous, non-specific threats

This list is non-exhaustive—please refer to relevant circuit law.



Past Persecution

Asylum Element #2: A Protected Ground (1 of 5)

An Asylum applicant must show that the harm suffered was on account of one of the **five protected grounds**:

1. Race,
2. Religion,
3. Nationality,
4. Political Opinion, or
5. Membership in a Particular Social Group (PSG).

References:

- INA § 208(b)(1)(B)(i)
- 8 C.F.R. § 1208.13(b)



Past Persecution

Asylum Element #2: A Protected Ground (2 of 5)

Protected Ground #1: Race

Examples of race and ethnicity may include:

Part 7. Biographic Information

1. Ethnicity (Select **only one** box)

- ☐ Hispanic or Latino
- ☐ Not Hispanic or Latino

2. Race (Select **all applicable** boxes)

- ☐ White
- ☐ Asian
- ☐ Black or African American
- ☐ American Indian or Alaska Native
- ☐ Native Hawaiian or Other Pacific Islander

Reference: Form I-485, Application to Register Permanent Residence or Adjust Status



Past Persecution

Asylum Element #2: A Protected Ground (3 of 5)

Protected Ground #2: Religion

Examples:

- Harm inflicted for practicing a specific religion
- Serious discrimination or criminal penalties imposed for practicing a certain religion

Protected Ground #3: Nationality

- Related to an applicant's ties to a particular nation
- Includes ethnic identity, which may differ from country of birth or citizenship



Past Persecution

Asylum Element #2: A Protected Ground (4 of 5)

Protected Ground #4: Political Opinion

- Affirmative political opinion
 - An applicant holds a sincere political opinion and
 - The persecutor is seeking to overcome that opinion.
- Imputed political opinion
 - A persecutor's belief that a person has a particular political opinion, regardless of whether that person holds such belief.



Past Persecution

Asylum Element #2: A Protected Ground (5 of 5)

Protected Ground #5: Membership in a Particular Social Group

- Must establish membership in the group
- The group must:
 - Share a common, ***immutable*** characteristic that they cannot change or should not be required to change,
 - Be defined with ***particularity***, and
 - Be recognized as ***socially distinct*** within the society in question.
- The applicant must delineate the proposed group or groups to the court.

References:

- *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)
- *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014)
- *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018)



Past Persecution

Asylum Element #3: Nexus

- An Asylum applicant must show that the harm suffered was ***on account of*** one of the five **protected grounds**.
- This is often referred to as the “nexus.”
 - ***Nexus: a link between the harm and a protected ground.***
- A protected ground **need not have been the sole reason** for the inflicted harm but must have been “**at least one central reason.**”

References:

- INA § 208(b)(1)(B)(i)
- 8 C.F.R. § 1208.13(b)



Past Persecution

Asylum Element #4: State Action

To be eligible for Asylum, an applicant must fear harm from:

- The home country's government, for example:
 - Police officers acting in their official capacity
 - Members of the military
 - Elected officials

OR

- A private person or group that the government is **unable or unwilling to control**.
 - Immigration Judges consider the government's action or inaction as a whole.

Reference: *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)



Past Persecution

Asylum Elements #1-4: Possible Outcomes

All 4 Elements Established

- ☒ Harm constituting persecution
 - ☒ Protected ground
(race, religion, nationality, political opinion, or membership in a PSG)
 - ☒ Nexus
 - ☒ State action
- = PP established, therefore rebuttable presumption of WFF

Not All 4 Elements Established

- ☒ Harm constituting persecution
 - ☒ Protected ground
(race, religion, nationality, political opinion, or membership in a PSG)
 - ☐ Nexus
 - ☒ State action
- = PP not established—but is there WFF?



Past Persecution

Rebuttable Presumption of WFF

If an applicant establishes PP:

- The Immigration Judge **presumes** that the applicant also has **WFF *unless***:
 - The Government (DHS) proves by a preponderance of the evidence:
 - A fundamental change in circumstances OR
 - Safe and reasonable internal relocation is available

References:

- 8 C.F.R. §§ 1208.13(b)(1), (b)(2)(ii)
- *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2007)
- *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012)



Past Persecution

Rebuttable Presumption of WFF: Possible Outcomes

DHS Does Not Rebut Presumption

- ☐ Fundamental change in circumstances
- ☐ Safe and reasonable internal relocation option

= WFF presumed = statutory eligibility for Asylum established—but discretion?

DHS Rebutts Presumption

- ☐ Fundamental change in circumstances
- ☒ Safe and reasonable internal relocation option

= Presumption of WFF rebutted
= statutory eligibility for Asylum not established—but Humanitarian Asylum?



Past Persecution

Humanitarian Asylum

- A **discretionary** form of relief that may be available when PP is established, but WFF is rebutted by the Government.
- The applicant must show:
 - “Compelling reasons” arising out of **severity of PP**
 - Harm suffered must be “atrocious,” and
 - Must be related to a protected ground
 - OR
 - There is a “reasonable possibility” of **other serious harm**
 - Must be at least as severe as persecution
 - Does NOT have to be related to a protected ground

Reference: 8 C.F.R. § 1208.13(b)(1)(iii)



Well-Founded Fear

How do you establish WFF?

- Must establish Asylum Elements #1-4
 - Standard:
 - **“Reasonable possibility”** of persecution \geq **10% chance**
 - Two ways to prove:
 - **Pattern or practice** or
 - **Individual targeting**
- Fear of harm must be:
 - Subjectively genuine (**the applicant is afraid** to return to their home country) AND
 - Objectively reasonable (**a reasonable person** in the applicant’s position **would fear** returning).

Reference: *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)



Well-Founded Fear

How is internal relocation assessed for WFF?

- Remember: Even if Asylum Elements #1-4 established, ***no WFF if internal relocation is available.***
 - If the persecutor is the **government or government-sponsored**, then internal **relocation is presumed to be unreasonable** and DHS must prove by a preponderance of the evidence that relocation is reasonable under all circumstances.
 - If the persecutor is **not the government and not government-sponsored**, then internal **relocation is presumed to be reasonable** and the applicant must prove by a preponderance of the evidence that it would be unreasonable to relocate.



Asylum Element #5: Discretion

Asylum is *discretionary* relief.

- An Immigration Judge is *not required* to grant Asylum, even if the applicant has satisfied all the elements.
- To support a grant of Asylum, the applicant may submit evidence of good character and other factors to support a favorable exercise of discretion

Reference: 8 C.F.R. § 1208.14(a)



Asylum: Key Takeaways

- Credibility and corroboration are threshold issues that can be fatal to a claim before the merits.
- 5 elements to prove Asylum:
 1. Harm constituting persecution;
 2. A protected ground (race, religion, nationality, political opinion, or membership in a PSG);
 3. Nexus;
 4. State action; and
 5. Discretion.
- May claim PP or WFF or both.
- Watch out for shifting burdens depending on whether the applicant has proven PP or WFF and whether the government has been established as the applicant's future persecutor.
- Availability of safe and reasonable internal relocation is fatal to WFF.
- Humanitarian Asylum may be available even in the absence of WFF if PP established.
- Even if statutory eligibility for Asylum is established, granting or denying is ultimately up to the IJ's discretion.



What is Withholding of Removal under the INA?

- Protection from removal
- If statutorily eligible, Withholding of Removal is **mandatory**.
- In general, noncitizens seek Withholding of Removal when they are **ineligible for Asylum** because of one or more Asylum bars.



How do you qualify for Withholding of Removal under the INA?

An applicant generally may not be removed to a country if:

- their life or freedom would be threatened in that country
 - which may be established by a showing of:
 - **PP** or
 - **A likelihood of future persecution**
- because of a **protected ground**—race, religion, nationality, membership in a particular social group, or political opinion.

References:

- INA § 241(b)(3)
- 8 C.F.R. § 1208.16(b)



How do you qualify for Withholding of Removal under the INA? (Cont.)

Elements:

An applicant must demonstrate:

1. It is ***more likely than not*** that they will face a **future threat to their life or freedom**;
2. **On account of**;
3. One of the five **protected grounds**;
4. **By the government or** a private actor that the government is **unwilling or unable to control**.

References:

- INA § 241(b)(3)(A)
- 8 C.F.R. § 1208.16(b)(1)-(2)



Future Threat to Life or Freedom

- The applicant must establish that it is ***more likely than not*** that they will be subject to persecution upon removal.
 - **Greater than 50% chance**
 - **A higher burden of proof** than for Asylum
 - Reference: *INS v. Stevic*, 467 U.S. 407 (1984)
- Recall: Asylum only requires WFF – 10% chance.
- PP creates a rebuttable presumption of a future threat to life or freedom.

Reference: 8 C.F.R. § 1208.16(b)(2)-(3)(ii)



What is the U.N. Convention Against Torture?

- An international human rights treaty aimed at preventing torture worldwide.
- The U.S. ratified the treaty in 1994.
- Under the CAT, **the Government cannot send a noncitizen back to a country where it is *more likely than not* that they will be tortured.**
- The U.S. may remove the noncitizen to a safe third country.
- Status may be terminated if the Government establishes that the noncitizen is no longer likely to be tortured in their home country.



Convention Against Torture

- An applicant must establish that it is more likely than not that they would be tortured if removed to the proposed country of removal.
- Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment.
- Proscribed purposes include, but are not limited to: intimidation, coercion, punishment, or discrimination.
- Unlike persecution, torture does not require a nexus to statutorily protected grounds.

References: 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18(a)



How do you qualify for protection under the Convention Against Torture?

The applicant must establish that:

- It is **more likely than not** they would be tortured if returned to their home country.
 - More likely than not = Greater than a 50% chance of torture
 - High bar

AND

- The torture must be at the hands of a **public official** or other person acting in an official capacity or **at the instigation of or with the consent or acquiescence of a public official** or other person acting in an official capacity.
- Note: Unlike in Asylum and Withholding under the INA, there is **no rebuttable presumption of future torture** for applicants who prove they were previously tortured, **no other burden-shifting framework**, and **no reasonableness inquiry for internal relocation**.



Convention Against Torture Explained: Torture

What is torture?

- Acts specifically intended to inflict **severe** physical or mental **pain and suffering**;
- **Intentionally** inflicted;
- For **the purpose of**: obtaining information or a confession, punishment, intimidation, coercion or for any reason based on discrimination of any kind;
- **By or at the instigation of or with the consent or acquiescence of a public official** who has custody or physical control of the victim;
- Not arising from lawful sanctions.

Reference: *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002)



Convention Against Torture Explained: Public Official

Who is a public official?

- Examples include:
 - An elected official
 - On-duty police officer
 - On-duty military officer
- BUT if not acting in an official capacity (**i.e., not acting under color of law**) – NOT covered by CAT
 - Includes any person who is **acting outside of the official scope or duties** of their position

Reference: *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020)



Convention Against Torture Explained: Acquiescence

What constitutes acquiescence?

- Public officials are aware of the torture, and
- Have not fulfilled their legal responsibility to intervene.

Several courts have adopted a “willful blindness” standard.

References:

- 8 C.F.R. § 1208.18(a)(7)
- *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000)
- *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002)



Deferral of Removal under the U.N. Convention Against Torture

- The INA makes some applicants ineligible for Withholding of Removal under CAT based on their criminal history.
 - Bars listed in INA § 241(b)(3)(B); 8 C.F.R. § 1208.16(d)
- But an applicant who demonstrates the necessary requirements for protection under CAT may be granted ***deferral of removal under CAT***.
- If a noncitizen is granted deferral of removal under CAT:
 - Removal of the noncitizen is deferred.
 - Conditions may be imposed for a grant.
 - The Immigration Judge must inform the noncitizen of any conditions imposed.
 - Continued detention of the noncitizen may be possible.
 - The Government can seek to terminate the grant of deferral at any time.

Reference: 8 C.F.R. § 1208.17



Eligibility Requirements

Type of Relief	Asylum	Withholding of Removal	CAT relief
Type of harm feared?	Persecution	Future threat to life or freedom	Torture
Likelihood of harm?	Reasonable possibility; a 10% chance can be sufficient	More likely than not; greater than 50%	More likely than not; greater than 50%
Nexus Requirement?	Yes - protected ground must be one central reason for harm	Yes - harm must be based on a protected ground (the nexus requirement varies by circuit)	NO nexus required
From whom must the respondent fear harm?	The government OR a non-governmental actor the government is unable or unwilling to control	The government OR a non-governmental actor the government is unable or unwilling to control	A public official OR with the consent or acquiescence of a public official



**This concludes the
Model Hearing Program's
Substantive Law Lecture on
Asylum, Withholding of Removal,
and Protection Under the
U.N. Convention Against Torture.**

Thank you for joining us.